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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 962

SAMUEL SPEVACK, *Petitioner*,

v.

SOLOMON A. KLEIN, *Respondent*.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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SAMUEL SPEVACK, *Petitioner*,

v.

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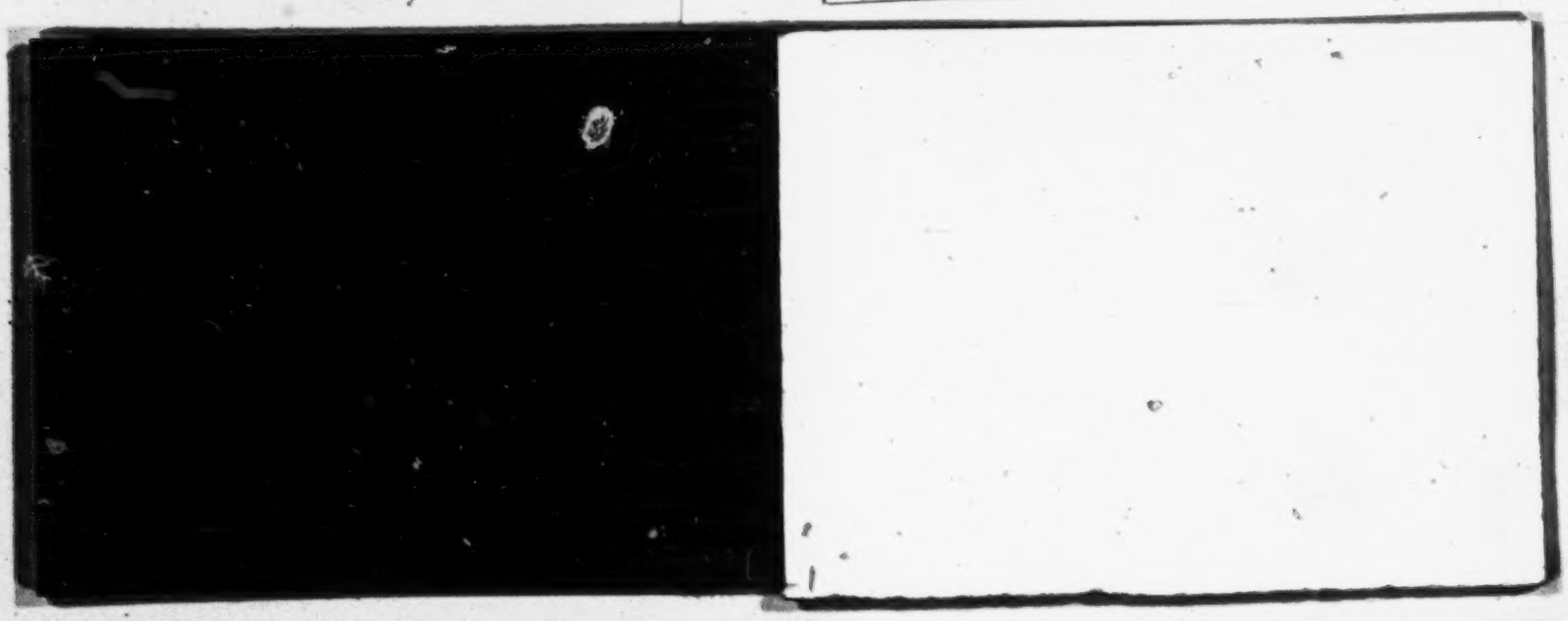
PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1

Respondent devotes two pages of his brief (pp. 6-7) to setting forth petitioner's July 6, 1961 letter to the Presiding Justice of the Judicial Inquiry indicating his intention, in light of this Court's decision in *Cohen* v. *Hurley*, 366 U.S. 117, to withdraw his claim of the privilege against self-incrimination, and to petitioner's counsel's subsequent equivocal statements to the Inquiry as to whether petitioner would continue to claim the privilege. We are unable to understand the significance of respondent's inclusion of that material, any more than could the Presiding Justice when the letter was offered in evidence near the conclusion of the proceedings in the Inquiry (R. 124-28). If the implication is intended that petitioner either failed adequately to claim the privilege or waived the privilege, however, that



implication would be flatly inconsistent with the findings of the Referee and wholly devoid of support in any of the courts below. The Referee specifically found that petitioner refused to answer questions or produce records under a claim of the privilege against self-incrimination (Ref. Rept. 22), that there was no evidence "that the privilege was invoked more extensively than reasonably required to protect [petitioner] against incrimination (*Id.*, at 10)," and that the Inquiry was neither misled nor prejudiced by the letter or statements of petitioner and his counsel (*Id.*, at 19-20). Neither the opinion of the Appellate Division nor the order or amended remittitur of the Court of Appeals suggests anything to the contrary, and, indeed, the opinion of the Appellate Division established that petitioner's claim of privilege was sufficient to preclude the State from compelling him either to testify or to produce records, though it also held that petitioner's election to claim the privilege must result in his disbarment.

2

Respondent also contends that this case does not present the issue of whether a state may adopt the doctrine that a lawyer who validly invokes the Fifth Amendment's privilege against self-incrimination must automatically be disbarred. Respondent asserts that the New York Court of Appeals held only that petitioner was disbarred because he refused to produce records and "interposed a blanket refusal 'to answer any questions which might be asked relating thereto'" (Br. in Op., p. 10), and that the Fifth Amendment gave him no privilege whatever to do either. The record and the opinions of the New York courts cannot conceivably be strained far enough to support this contention.

On the first day of the proceedings before the Judicial

Inquiry, counsel for the Inquiry advised petitioner that he would be called upon to testify (R. 18). He was subsequently sworn as a witness (R. 52) and asked whether he had produced the documents called for in the subpoena, and, if not, why he had failed to do so (R. 59). Petitioner claimed his privilege against self-incrimination (R. 60-61), but the court, insisting that the basis for refusal must be clear, stated,

> "I want to know whether, assuming they were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him (R. 70)."

Petitioner replied in the affirmative, and the court stated that "you have a perfect right to plead that constitutional privilege. That is my opinion (R. 71)."

The proceedings were adjourned pending this Court's decision in the *Cohen* test case, after which decision counsel for the Inquiry wrote petitioner that he was to appear before the Inquiry to produce his records and to testify concerning those records (R. 77). Petitioner's counsel appeared for him and was advised that petitioner should appear, produce the records, "take the stand," "explain the absence of any other records," and discuss each item called for in the subpoena (R. 79). Petitioner appeared and was sworn, but he refused to produce the records or answer questions concerning them under a claim of his privilege against self-incrimination and on other federal constitutional grounds (R. 117-18). He maintained that position in response to questions about each item called for in the subpoena (R. 118-19).

Thus, the record establishes that petitioner was asked not only to produce records but also to answer questions

Even if the only testimony sought by the State concerned the whereabouts of non-produced records, and even if petitioner were not privileged to refuse to produce records, it is thoroughly settled that the testimonial privilege would apply. See *Curcio* v. *United States*, 354 U.S. 118, 128.

Respondent's petition to the Appellate Division asking that petitioner be disciplined charged him with misconduct in his "refusal to answer questions . . . ." (Petition of Solomon A. Klein, p. 4). The Referee found that petitioner "refused to produce such records or answer any questions in relation thereto . . . ." (Ref. Rept., p. 22). The Appellate Division ordered his disbarment "on the basis of the Referee's unchallenged finding that [he] refused to testify and produce his records . . . ." (Petition for Certiorari, App. A, p. 32). The Court of Appeals affirmed "on the authority of *Cohen* v. *Hurley* . . ." and also "on the further ground . . ." that there is no privilege under the Fifth Amendment to refuse to produce records that are required by law to be kept. (Petition for Certiorari, App. C). Surely if the Court of Appeals had concluded that petitioner's refusal to answer questions was not properly based upon the Fifth Amendment it would have said so and would not have put its primary reliance upon *Cohen*, which held that disbarment was permissible even when a state privilege against self-incrimination was validly invoked.

Indeed, if after the Judicial Inquiry and the Appellate Division had both unequivocally recognized that petitioner had a constitutional privilege to refuse to answer questions, and had validly asserted the privilege, respondent were to be permitted to rewrite the Memoradum Opinion of the Court of Appeals in the manner he has suggested this case would call simply for summary reversal under the doctrine of *Raley* v. *Ohio*, 360 U.S. 423. The important constitutional

issues raised by the petition, however, cannot be so easily obliterated.

Respectfully submitted,

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